

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-6154

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ORIGINAL

TO BE ARGUED BY
SIDNEY SILLER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
DOCKET NO. 76-6154

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CADET TIMOTHY D. RINGGOLD, Individually and on behalf of all
other similarly situated cadets of the U.S. Military Academy,

Plaintiff-Appellants,

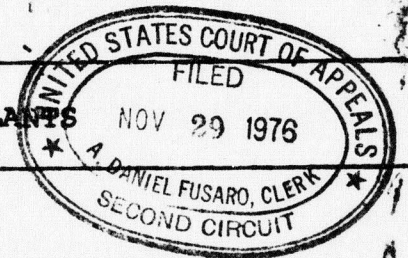
-v.-

P/S

THE UNITED STATES OF AMERICA, MARTIN R. HOFFMAN, as Secretary
of the Department of the Army, LT. GEN. SIDNEY B. BERRY, as
Superintendent of the USMA, BRIG. GEN. WALTER F. ULMER,
Commandant of Cadets, USMA, CADET WILLIAM ANDERSEN, as out-
going Chairman of the USMA Honor Code Board Committee, and
CADET MICHAEL IVY, as incoming Chairman of the USMA Honor
Code Board Committee,

Defendant-Appellees.

BRIEF FOR PLAINTIFF-APPELLANTS



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Commandant of Cadets, USMA, CADET WILLIAM ANDERSEN, as out-
going Chairman of the USMA Honor Code Board Committee, and
CADET MICHAEL IVY, as incoming Chairman of the USMA Honor
Code Board Committee,

Defendant Appellees.

BRIEF FOR PLAINTIFF-APPELLANTS

PRELIMINARY STATEMENT

This is a suit to enjoin the defendants, in their
representative capacity, from in any manner fostering, imple-
menting and enforcing the Cadet Honor Code and System at the
United States Military Academy at West Point, New York (herein-
after referred to as the "Academy"). The basis for requesting
this relief is that the Cadet Honor Code and System are illegally
promulgated, void for vagueness, arbitrarily and capriciously

implemented, and violative of the "due process" guarantees the United States Constitution.

THE CODE. The "Cadet Honor Code" (hereinafter referred to as the "Code") provides, "A cadet will not lie, cheat or steal, nor tolerate those who do". The sole penalty for its violation is separation from the Academy (A.219)*

THE SYSTEM. The Code is supplemented, for the alleged purposes of instruction and implementation, by a "System" consisting of informal instructional materials, classroom discussion and enforcement procedures (A.132-215).

In operation, a committee of cadets is elected annually by the corps to administer the Code. It is from this group that the cadet boards charged with adjudicating Code violations are appointed.

Anyone may report a cadet for violating the Code. The violating cadet, himself, may report his own transgression, and, indeed, is required to do so if the proscriptions of the Code are to be literally interpreted.

When such a report is received, the chairman of the honor committee, elected by the other honor committee members, appoints a three member investigating sub-committee from among

*References to the Joint Appendix are hereafter noted as "A. ---".

the other committee members. This sub-committee decides, on the basis of its investigation which includes an involuntary interrogation of the accused cadet, whether a violation has occurred, and, if so, it recommends a formal honor board hearing.

The chairman of the honor committee selects a board of twelve members from among the remaining honor committee members to hear the case. The honor board is presided over by a non-voting chairman.

The accused cadet is not permitted to have legal counsel, but may be represented at the hearing by a cadet advisor. The accused cadet may not address the board directly, but only through his advisor. He may not cross-examine witnesses, but may submit written questions to the chairman to be asked of witnesses.

After examining witnesses and the evidence, the honor board enters into private deliberations and reaches its verdict. A finding of guilt must be by unanimous vote.

Cadets found guilty are asked to resign forthwith. Alternatively, the guilty cadet may request a de novo hearing before a board of officers which then makes recommendations to the Superintendent of the Academy. It is the option of the Superintendent to accept a cadet's resignation, the recommendations of the officer board or even to direct a court martial

for a cadet found to have violated the Code.

In the final analysis, then, the cadet corps is subject to a Code and System which in effect provides that a cadet will not lie, cheat or steal, nor tolerate those who do, and if he violates such proscriptions he shall resign, be expelled and/or be court-martialed.

The Code and System are involuntarily imposed: The Appellants' allege that each cadet, as a condition of his appointment to the Academy, and pursuant to congressional enactment is required to take an oath to "obey the legal orders of his superior officers, and the Uniform Code of Military Justice (A.70). Contrariwise, a cadet is not required to swear allegiance to the so-called "Cadet Honor Code and System" as a condition of his appointment to the Academy, nor as a condition to remain there.

Appellants' further submit that although the proscriptions of the Code are possibly admirable principles, not only for cadets but all right-thinking citizens, their literal application and enforcement at the Academy under threat of mandatory resignation, expulsion and/or court-martial for violation, often breeds conduct derogatory of such lofty goals.

Dismissal of complaint: By way of opposition to Appellants' suit, the Appellees moved for summary judgment

dismissing the complaint pursuant to Rule 56(b), Fed. Rules Civ. Prac.

The court below dismissed Appellants' complaint holding that the promulgation of the Code and System was permissible under the constitutional authority of the President, as Commander in Chief of the Armed Forces and Congressional authorization for the President to "prescribe regulations for the government of the army". 10 U.S.C., §3061; that the Code and System do not infringe upon the cadets' constitutional rights; and that the Uniform Code of Military Justice does not preclude promulgation of the Code and System which are merely regulations governing the behaviour and conduct of cadets at the Academy (A.5-21).

The court below further decided that Appellants' request for an evidentiary hearing was unnecessary since all of the facts alleged by Appellants were admitted (A.21).

THE FACTS

Appellant, Timothy D. Ringgold, during the course of a "privileged" interview with Undersecretary of the Army, the Hon. Norman Augustine, for the purpose of exchanging views and opinions concerning the Code, informed Undersecretary Augustine that the latest "Cheating Scandal" at the Academy was widespread, that the "guilty" cadets (approximately 49 upon the

date of the meeting) had done no more nor less than every other cadet had done during his cadet career.

The substance of Appellant's statement was learned by the Chairman of the Cadet Honor Committee. He subsequently asked Appellant, Ringgold, if he knew of any cadets who had cheated and had not been investigated. Appellant, Ringgold, refused to answer on the grounds that an affirmative reply would be a violation of the Code (Toleration) and a negative reply would also be a violation (lying).

He was subsequently charged and found guilty of the Honor Code Violation of "Toleration" by a Cadet Honor Board (A.35-40).

Appellants, Mark Anthony English, Stephen Scott Hutton and Garrett Paul Keane were charged with the Honor Code Violation of "Cheating " upon a take-home electrical engineering problem.

In each instance, the accepted procedures presented by the Code and System were more or less applied to their respective cases and they were adjudged "guilty" by so-called "Cadet Honor Boards". Each, rather than resign, sought and was granted a hearing by an "officer board". The findings of "guilt" by the Cadet Honor Boards were sustained in each instance.

ISSUES PRESENTED

1. Was the District Court correct in finding that the promulgation of the Code and System was within the rule making power of the Executive Branch of the government?
2. Was the District Court correct in finding that the Code and System was not violative of the "Due Process" guarantees of the United States Constitution?
3. Was the District Court correct in finding that the Code and System were not void for vagueness.
4. Was the District Court correct in finding that the guarantee of Officer Board De Novo Hearings to cadets convicted of Code violations satisfied the "due process" requirements of the United States Constitution?

A R G U M E N T

POINT I

The promulgation of the Honor Code and System is an unauthorized exercise of the Regulatory power of the Executive Branch of the Government.

Appellants submit that the promulgation of the "Honor Code and System" constitutes an illegal and unauthorized exercise of executive power.

United States Constitution, Article I, Section 8, pro-

vides that Congress shall be empowered

" * * * to make rules for the government and
regulation of the land and naval forces * * * "

Pursuant to this authority, Congress has, in fact, promulgated a voluminous body of law for the maintenance of order and discipline within the military services. The most comprehensive of these laws is embodied in the Uniform Code of Military Justice, 10 U.S.C. 801, et seq., effectively pre-empting the imposition and enforcement of the Code and System as a basis for behavioral standards, and the enforcement and expulsion practices emanating thereunder.

Initially, Congress has enacted the sole standards for admission of candidates to the U.S.M.A., 10 U.S.C. Section 4346 (A 70).

As a condition of admission, a cadet candidate is obliged to take an oath of allegiance. In now way does this oath require adherence to the Code, nor acceptance of the so-called enforcement "system." Indeed, even if it did, a serious question would arise as to the validity of the oath since as a candidate for admission to the Academy, he would have no understanding or knowledge of the ramifications of the promise of such adherence.

Secondly, it is provided by Congressional Act that a cadet, once admitted to the Academy, is subject to expulsion for deficiencies in conduct or studies. 10 U.S.C., S. 4351 (A 71).

The conduct envisaged here is obviously such conduct as will have been determined to be unlawful, after adjudication

in accordance with the adjudication guidelines set forth in the Uniform Code of Military Justice, or failure to maintain a passing academic standing. The Uniform Code of Military Justice is expressly applicable to "cadets." 10 U.S.C., S. 801 (6), 802 (2).

Finally, a cadet may be expelled from the Academy for violations of the "hazing" proscription. 10 U.S.C., S. 4352 (A 72).

A minute examination of the U.S. Constitution and the enactments of Congress fails to relieve the initial impression that the imposition of the Code and System is unauthorized and gratuitous. Neither the Department of the Army nor the Superintendent of the Academy has the power to promulgate same without some valid delegation of power by the Constitution, the Congress or even the President, from his limited authority.

The Code and System, born over 150 years ago, and fostered and implemented under the misguided aegis of unsuspecting non-military administrators and indulgent and tradition-minded military leaders has caused the unnecessary and unwarranted mass destruction of countless budding military and civilian careers, as well as the reputation and happiness of untold numbers whose character and personality have been permanently tarnished, including those of the Appellants herein, and their families.

There is little doubt that the Superintendent of the Academy possesses certain inherent authority to maintain discipline within his command. It is elementary that the scope of his power may not exceed the power of the Secretary of the Army and ultimately the power of the President of the United States.

The question then is what are the limits placed upon the rule-making power of the Commander in Chief.

It should be noted that although the Constitution gives Congress the exclusive authority to govern the military, some courts have recognized that some rule-making authority is also vested in the President. U.S. v Symonds, 120 U.S. 46, 49 (1887). However, the court cautioned that the rule-making authority of the President shall not pre-empt or conflict with the statutes defining his powers. Unfortunately, the exact extent and limits upon the executive power has never been resolved by either Congress or the judiciary.

Further, the Court of Military Justice has adopted this pre-emption rule by stating that the Uniform Code of Military Justice supercedes conflicting military customs. U.S. v Osborne, 9 U.S.C.M.A., 455, 26 C.M.R. 235 (1958); U.S. v Johnson, 7 U.S.C.M.A. 488, 22 C.M.R. 278; U.S. v Wappler, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953).

It appears, then, that the rule-making power of the Executive is subordinate to that of the legislative upon matters involving military discipline.

Nevertheless, it is generally conceded that even the President's limited rule-making power, such as it is, must be grounded in military necessity, the degree of necessity increasing as the rule-making in question approaches in form and in substance a legislative act. Hirabayashi v U.S., 320 U.S. 81 (1943); Ex Parte Quirin, 317 U.S. 1, 28-29 (1942).

Applying this rule to the Code and System, the executive rule-making power, limited by the necessity principle, is, at best,

valid if necessary to the particular military objective, the training of future officers.

Thus, Academy rules, in general, the Code and System in particular, must be reasonably necessary to the training of future officers. Appellants submit that many aspects of the Code and System clearly do not meet this test and are accordingly without constitutional authorization.

POINT II

The "Honor Code and System" fail to meet the "Due Process" requirements of the U.S. Constitution.

It is well established that judicial and administrative actions must conform to the requirements of due process. Wisconsin v Constantineau, 400 U.S. 433 (1971); Goldberg v Kelly, 397 " S. 254 (1970).

In the latest cases before the Court of Military Appeals and in the civilian federal courts, courts have recognized the proposition that specific procedural safeguards, guaranteed by the Fifth Amendment of the U.S. Constitution to the civilian population are similarly applicable to military personnel. Friedberg v Resor, 453 F. 2d 935; Unglesby v Zimny, 250 F. Supp. 714; U.S. v Dillon, 16 C.M.R. 835; Hagopian v Knowlton, 470 F. 2d 201.

Appellants submit that the Code and System fail to satisfy the "Due Process" guarantees of the U.S. Constitution. The cases pro-

liferate throughout the annals of our jurisprudence, and specifically and uniformly uphold the basic tenets recited in the U.S. Constitution.

Even the Uniform Code of Military Justice has expressly included the protective features necessary to insure "due process" to accused military personnel.

Nevertheless, the Code and System blatantly infringes upon those rights and deprives same to accused cadets. These include the right to :

- 1- be informed of the nature of the accusation;
- 2- remain silent;
- 3- counsel;
- 4- cross-examine witnesses; and
- 5- equal protection and treatment under its proscriptions and enforcement.

The court below nominally adopted the doctrine that "the power of the District Court to review procedures used at our service academies in the separation or dismissal of cadets and midshipmen is clear." Hagopian v Knowlton, 470 F. 2d 201 (2d Circ. 1972); Wasson v Trowbridge, 382 F. 2d 807 (2d Circ. 1967); Krawez v Stans, 306 F. Supp. 1230, 1233-34 (E.D. N.Y. 1969).

However, it then totally avoided the essence of Appellants' argument that those very procedures under review were violative of the "due process" requirements of the Constitution. The court relied upon the concepts that since the Constitution does not prescribe any

particular disciplinary code for use at West Point, it is a matter that has traditionally been left to the discretion of the military. (A 14)

It further stated that, "accordingly, except to the extent that an asserted constitutional right is implicated, this court does not have jurisdiction to adjudicate Plaintiff's attack upon the Honor Code and System." (A 8-9)

The court below has not addressed the claims of Appellants that their rights of "due process" have been violated, even while accepting all of Appellants' factual allegations, and even after giving them every benefit of the doubt, in interpreting their complaint. (A 21)

The court denied Appellants an evidentiary hearing to determine the issues alleged by Appellants in their complaint, motion papers and supporting affidavits and exhibits. In an earlier order, the court summarily quashed subpoenas duly issued and served upon persons with sole knowledge of all of the facts, thus depriving Appellants of the right to have their day in court. (A 26-30)

A cursory reading of the "Honor Committee Procedures" Manual (A 132-184) and the "Honor Instruction" Manual (A 185-215) demonstrates the inescapable fact that an accused cadet's guaranteed rights of due process have been and are being violated.

For example, the Introduction to the "Honor Instruction" Manual states, in part, "3. Background : Questions inevitably arise during instruction for which no one answer exists." (A 186)

Another example, contained in the memorandum dated March 8, 1976, annexed to the "Honor Committee Procedures" pamphlet, "1. In an effort to ensure for the U.S.M.A. Staff and Faculty a complete understanding of the Cadet Honor System, you are being provided with a copy of the Honor Committee Procedure. These procedures are for your use only, and should not be shown to anyone except the officer personnel of the U.S.M.A. Staff and Faculty." (underscoring added)

(A 133)

POINT III

The Proscriptions of the Code are not sufficiently definite and certain to allow their equal application and enforcement.

The Code, though consisting of only thirteen little words, is so vague and ambiguous in its practical application that many hours of class room discussion and instruction are required in an attempt to indoctrinate a cadet in its meaning. (A 132-215) Often the interpretation of the Code by one cadet may vary from that of another cadet.

The "Honor Instruction" Manual consists of numerous "lesson plans" covering some twenty-eight pages, and is designed as a basis for teaching cadets the meaning of the Code, defining "lying," with a number of distinguishing explanations and exceptions. "Cheating" is similarly defined, with exceptions. "Quibbling" and "toleration" are similarly listed and discussed.

A corollary of the instruction is an effort to instill a "spirit" or "bond" among cadets rather than merely a knowledge of the meaning of the words lie, cheat or steal which all cadets well understand. This, of course, can and often does result in an unsuspecting and insidious effect.

Since a cadet is tried by his peers, and must be convicted by a unanimous vote of the Honor Board Committee, those accused cadets who have mastered the "spirit" and "bond" credo of the Academy, and thus "fit in," are seldom charged much less found guilty of a Code violation, while those who are considered not sufficiently indoctrinated may seldom expect an acquittal of such charges. Lacking constitutional "due process" safeguards, such a cadet is subject to the whimsey of the elected members of the honor committee and membership of the Honor Board whose displeasure in other respects the accused cadet may have incurred.

Furthermore, the enforcement of the Code is accomplished pursuant to a loosely fabricated set of informal procedures. (A 185-215) In most instances, these procedures are not sufficiently known and understood by either the accused cadet or the honor committee representatives who are the enforcers of the "system." As a result, an accused cadet is denied even what little protection may therein accrue to him.

Although there is widespread agreement that the void-for-vagueness doctrine of the Supreme Court is not restricted to statutes or regulations imposing criminal sanctions, the courts have specifically declined to date to decide whether the doctrine is applicable to Academy rules. Dunmar v Ailes, 348 F 2d 51, 55

(D.C. Cir. 1965). However, academy proscriptions are suspect in light of the recent decisions which have held void Articles 133 and 134 of the Uniform Code of Military Justice, often referred to as the "general articles." They were held void for vagueness and overbreadth by two circuit courts of appeals. Levy v Parker, 478 F 2d 772 (Third Cir. 1973); Avrech v Secretary, 477 F 2d 1237 (D.C. Cir. 1973).

The reasoning of these cases is particularly applicable to the Academy whose code proscriptions often fail to give reasonable notice of what is prohibited so that a cadet may act accordingly and permit arbitrary and discriminatory enforcement by cadet officials and officers.

POINT IV

Violations of "Due Process" by the "Honor Code and System" are not cured by Officer Board "De Novo" appeals.

The court below stated that " * * * the (Cadet Honor) Committee's role with respect to Honor Code violations is entirely investigative. As a means of encouraging self-discipline, without ceding to it any authority to make final adjudications, the Academy has assigned it the function of identifying suspected violators." (A 16-17).

Complementing this statement was the court's assumption that the Cadet Honor Committee's findings are merely investigative; that an official board of officers shall conduct a De Novo hear-

ing and only its ultimate determination can affect the future of the accused cadet. (A 14)

However, the crux of the matter is that most cadets who have been found guilty by a Cadet Honor Board have resigned under pressure of ultimate cadet sanctions without requesting an officer board hearing. Shame and fear of reprisal from their cadet peers are powerful forces with which the average cadet cannot cope.

The guilty verdicts of those cadets who have appealed to the officer boards have for the most part been affirmed. The reason is obvious. The Board of Officers is comprised of Academy products, themselves, thoroughly indoctrinated in the "spirit" and the "bond" of the Academy. Such officers have survived the Code and System and now universally adopt the pre-condition that the Honor Code is a creature of the Cadet Body and the same should be self-administered by the cadets themselves with the least amount of interference from their superior officers. It is true that some courts, in reviewing adjudications by administrative agencies, including a relatively recent student disciplinary decision, have held that a de novo appellate hearing compensates for a denial of due process at an earlier stage of the proceeding. Zanders v Louisiana State Board of Education, 281 F. Supp. 747 (W.D. La., 1968).

However, other courts have rejected this doctrine, recognizing that in order to adequately protect important individual interests, a proper hearing is required before rather than after that interest is abridged. Goldberg v Kelly, supra; Kelly v Wyman, 294 F. Supp. 893 (S.D. N.Y. 1968).

"Due Process" requires more than a "fair" appellate hearing. A cadet must have a fair initial hearing since the damage he will suffer begins to accrue immediately after a Cadet Honor Board finds him guilty of a violation. Such damages include but are not limited to involuntary segregation from the Corps, prohibition from attending classes and Corps functions, mandatory resignation or almost certain expulsion from the Academy, reduction in military rank, self-guilt and damage to reputation.

Furthermore, the de novo officer board appeal is, more often than not, ineffectual since a convicted cadet is pressured to resign and not to appeal, and even if he does appeal and wins a reversal of this conviction by an officer board, he is still deemed "guilty" by his cadet peers.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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November 26, 1976

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